

produced on both the farm for which it was identified as having been produced, and the farm of actual production, if known, or, as the case may be, such quantity of tobacco shall be considered as actually marketed from the farm.

[55 FR 39914, Oct. 1, 1990, as amended at 57 FR 43582, Sept. 21, 1992]

§ 723.409 Producer violations, penalties, false identification collections and remittances by dealers, buyers, handlers, warehouses, and other parties; related issues.

(a) *Generally—(1) Circumstances in which penalties are due.* A penalty shall be due on all marketings from a farm which are:

- (i) In excess of the applicable quota or allotment;
- (ii) Made without a valid marketing card;
- (iii) Made under circumstances where a buyer or dealer, or their agents, know, or have reason to know, that the tobacco was, or is, marketed in a manner which by itself or in combination with other marketings is designed to, or has the effect of, defeating the purposes of the tobacco price support and production adjustment program, avoiding marketing quota limitations, or otherwise avoiding provisions of this part or part 1464 of this title;
- (iv) Falsely identified; or,
- (v) Marketings for which the producer or other party fails to make a proper account as required by the provisions of this part.

(2) *Amount of the penalty.* The amount of the penalty shall be the amount computed by multiplying the penalty rate by the penalty quantity.

(3) *Penalty rate.* The penalty rate for purposes of this section is that rate which is computed as the penalty rate per pound for the applicable kind of tobacco under § 723.308, except to the extent that a converted penalty rate may be used as provided for in this section.

(4) *Penalty quantity.* The penalty quantity for purposes of this section is the quantity of tobacco that is determined by the county FSA committee subject to the Director's review to be subject to penalty, provided further that:

- (i) For burley and flue-cured tobacco, the penalty quantity for purposes of

this section shall be the amount of marketings from the farm in excess of 103 percent of the farm's effective marketing quota for that year, except that if the violation involves false identification or a failure to account for tobacco, the FSA may, in its discretion, depending on the nature of the violations, use as the penalty quantity an amount up to 25 percent of the farm's effective marketing quota plus 100 percent of the farm yield on any excess acreage for the farm (acreage planted in excess of the allotted acres, as estimated or determined).

(ii) For tobacco other than burley and flue-cured tobacco, the penalty quantity shall be the amount of marketings from the farm in excess of the farm's marketing quota provided further, that in order to aid in the collection of the penalty the FSA may endeavor, to the extent practicable, to apply the penalty to all of the farm's marketing by converting the full penalty rate to a converted proportionate penalty rate which rate may be identified on the producer's marketing card and collected and remitted accordingly. In making the calculation of the converted penalty rate, the agency shall take into account any carryover tobacco applicable for the farm. If an erroneous penalty rate is shown on the marketing card, then the producer of the tobacco and the producer who marketed the tobacco shall be liable for any balance due.

(5) *Limitations on reduced penalty quantities.* No penalty shall be assessed at less than the maximum amount unless it is determined by the county FSA committee, with the concurrence of the State FSA committee, that all of the following exist with respect to such violation:

- (i) The violation was inadvertent and unintentional;
- (ii) All of the farm's production has been accounted for and there are no excess marketings for which there are penalties outstanding;
- (iii) The records for all involved farms have been corrected to show the marketings involved; and
- (iv) The false identification or failure to account did not give the producer an advantage under the program.

(6) *Effect of improper, invalid, deceptive or unaccounted for marketings on penalty quantity calculation.* Any marketing made without a valid marketing card, falsely identified, or unaccounted for in accordance with the requirements of this part, or made under circumstances which are designed to, or have the effect of, defeating the purpose of the tobacco marketing quota and price support program, avoiding any limitation on marketings, avoiding a penalty, or avoiding compliance with, or the requirements of, any regulation under this part or under part 1464 of this title, shall be considered an excess marketing of tobacco. Further, such marketings shall, unless shown to the satisfaction of the county FSA committee to be otherwise, be considered, where relevant, to be in excess of 103 percent of the applicable marketing quota for the farm, and shall be subject to a penalty at the full penalty rate for each pound so marketed.

(7) *Pledging of tobacco by an ineligible producer.* In addition to any other circumstances in which a penalty may be assessed under this part, the marketing or pledging for a price support loan of any tobacco when the producer is not considered to be an "eligible producer" under the provisions of part 1464 of this title, shall be considered to be a false identification of tobacco and shall be dealt with accordingly. This remedy shall be in addition to all others as may apply.

(8) *Failures to make certain reports.* If any producer who manufactures tobacco products from tobacco produced by such person or another fails to make the report required by § 723.408(f) or otherwise required by this part, or makes a false report, such producer shall be deemed to have failed to account for the disposition of tobacco produced on the farm(s) involved. The filing of a report by a producer under § 723.408 of this part which the State FSA committee finds to be incomplete or incorrect shall constitute a failure to account for the disposition of tobacco produced on the farm.

(b) *Special provisions for tobacco buyers, dealers, handlers, warehouse operators and others who acquire, handle, or facilitate the marketing of tobacco.* Notwithstanding the provisions of para-

graph (a) of this section and other provisions of this part:

(1) Unless such amount has been remitted by another in accord with the provisions of this part, a dealer, buyer, warehouse operator or other person handling tobacco shall collect, and remit to FSA, an amount equal to the full penalty rate provided for in § 723.208 times the quantity of tobacco involved where the tobacco is not identified with a valid producer or dealer card, the tobacco is sold under suspicious circumstances, or when there is reason to suspect that the tobacco may be subject to a penalty for any reason or may be marketed in derogation of the goals and purposes of the tobacco support program. For purposes of the preceding sentence "handling" shall include any services provided with respect to the tobacco, and any facilitation of the marketing of tobacco regardless of the level or amount of contact, if any, that the party may actually have with the tobacco.

(2) The amount of the penalty required to be collected may be deducted from the proceeds due a seller and all parties chargeable under paragraph (b)(1) of this section shall be jointly and severally liable for insuring that the monies are remitted to FSA except to the extent that the Director shall allow for an exemption to facilitate the marketing of tobacco, or for some other reason.

(3) The collection and remittance of penalty shall be in addition to any other obligations that such person may have to collect other amounts, including other penalties or assessments due on such marketings.

(4) If a penalty is collected and remitted by a buyer, dealer, or warehouse operator that is shown not to be due or only partially due, then the overpayment shall be refunded to the appropriate party. It is the responsibility of the person that collected the penalty and the person that sold the tobacco involved to show to the satisfaction of the FSA that such penalty is not due in the full amount collected.

(c) *Canceled allotment or quota.* If part or all of the tobacco produced on a farm has been marketed and the farm acreage allotment or farm marketing quota for the farm is canceled, any

penalty due on the marketings shall be paid by the producers.

(d) *Overmarketing proportionate share of effective farm marketing quota-burley or flue-cured tobacco.* With respect to burley or flue cured tobacco, if the county FSA committee determines that the farm operator or another producer on the farm has marketed more than 103 percent of such operator's or producer's share of the effective farm marketing quota with intent to deprive some other producer on the farm from marketing such producer's proportionate share of the same crop of tobacco, such operator or other producer shall be liable for marketing penalties at the full rate per pound for each pound of tobacco marketed above 103 percent of such producer's share of the effective farm marketing quota. However, the sum of such penalties shall not exceed the total penalties due on total marketings above 103 percent of the effective farm marketing quota for the farm on which such tobacco was produced. Before assessment of penalty pursuant to this paragraph, a hearing shall be scheduled by the county FSA committee and the operator and affected producers shall be invited to be present, or to be represented, to determine whether the operator or another producer on the farm has marketed more than 103 percent of such person's proportionate share of the effective farm marketing quota. The notice of the hearing shall request the farm operator and affected producers to bring to the hearing floor sheets and other relevant supporting documents. At least two members of the county FSA committee shall be present at the hearing. The hearing shall be held at the time and place named in the notice and any action taken to impose penalty shall be taken after the hearing. If the farm operator or other affected producer does not attend the hearing, or is not represented, the county FSA committee shall make a determination on the basis of available records and shall assess any penalties that may be required against the applicable person.

(e) *Penalties not to be assessed-burley or flue-cured tobacco.* With respect to burley or flue-cured tobacco, if the operator or another producer on the farm markets a quantity of tobacco above

103 percent of the effective farm marketing quota for the farm and such overage is found to have been caused by the failure to record or improper recording of tobacco poundage data on the marketing card, that amount of the penalty as was due to such failure to record or improper recording will not be required to be paid by the farm operator or other producer if:

(1) For amounts of \$100 or less, the county FSA committee, and

(2) For amounts over \$100, the county FSA committee with approval of the State FSA committee determines that each of the following conditions is applicable:

(i) The failure to record or incorrect recording resulted from action or inaction of a marketing recorder or another FSA employee, and

(ii) The farm operator or another producer on the farm had no knowledge of such failure or error. Overmarketings for a farm for which the marketing penalty will not be paid pursuant to the provisions of this paragraph shall be determined based upon the correct effective farm marketing quota and correct actual marketings of tobacco from the farm.

(f) *Refusal to contribute required assessments.* A marketing penalty at the full rate per pound is due on each pound of tobacco marketed from a farm when the farm operator or producers refuse to pay no-net-cost or marketing assessments as provided in part 1464 of this title. In all such cases, the farm from which the tobacco has been produced shall be considered to have a marketing quota of zero pounds and an allotment of zero acres.

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§ 723.410 Penalties considered to be due from warehouse operators, dealers, buyers, and others excluding the producer.

Subject to any additional requirements or provisions for remittances which are contained in § 723.409 of this part, any marketing of tobacco under one of the following conditions shall be considered to be a marketing of excess tobacco.

(a) *Auction sale without burley or flue-cured tobacco marketing card.* For burley